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# The Fault Pit

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# THE FAULT PIT

David G. Owen\*

Fault lies at the heart of tort law, the private law of wrongs.<sup>1</sup> This concept, simple yet profound, always has been true and probably always will. In the early history of the law, the public law of crimes usually dwarfed in practical significance the private law of harms.<sup>2</sup> Yet within the civil law, fault and legal responsibility for harm have lain together through the mists of time, inextricably intertwined, bound one unto the other.<sup>3</sup>

As societies have imposed upon themselves across the ages the civilizing restraints of law, they have often moved in fits and starts, sometimes erring in the process. Thus it is that the role of fault, from time to time in the history of the law, has sometimes waned. So, for example, as the law of accidents sought identity in America's early years of nationhood, fault had to struggle hard to free itself from dormancy in centuries of frozen doctrine to its natural position at the center of the law. It was not until 1850, in *Brown v. Kendall*,<sup>4</sup> that Chief Judge Shaw officially pronounced the dominant position of fault in the law of accidents. For the century that followed, fault reigned supreme as the ruling concept in the law of torts.<sup>5</sup>

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<sup>1</sup> "Tort," from the French word for injury or wrong, derived originally from the Latin "tortus," meaning twisted or crooked. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (none of this "et al." rubbish) § 1 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

<sup>2</sup> See *id.* § 2.

<sup>3</sup> See generally OLIVER WENDELL HOLMES, JR., THE COMMON LAW 2-5, 88-107 (1881); Nathan Issacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954, 965-66 (1918); Percy H. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 37-38 (1926).

<sup>4</sup> 60 Mass. (6 Cush.) 292 (1850).

<sup>5</sup> Holmes was undoubtedly correct, in 1881, in asserting that "the law does, in general, determine liability by blameworthiness." HOLMES, *supra* note 3, at 108. The transformation of tort law's basis of liability in the nineteenth century to an explicitly fault-based moral

About 1950, more or less, some well-meaning but misguided reformers began to challenge the supremacy of fault in the law of accidents.<sup>6</sup> Within about a decade, by about 1960, some of their dissident ideas had begun to seep into the law.<sup>7</sup> And by the 1970s, the dominance of fault in the law of torts was being challenged on many fronts—as its nemesis, strict liability, rapidly gained scholarly support and doctrinal ground. As the twentieth century closes its doors, however, fault is once again reasserting its sovereign role in the law of torts.

In hindsight, the law's infatuation in recent decades with a rule of strict liability, in opposition to a rule of fault or negligence, is now beginning to take on an air of quaintness, reflecting the exuberant excesses of youth. From the vantage point of the law's maturity, gained by its awkward, fitful, and ultimately unsuccessful effort to make sense out of a broad doctrine of strict products liability, fault's true position at the center of tort law is becoming clearer by the day.

The most valuable chronicling of the history of tort law in America has emerged from the computer of Gary Schwartz. In his prior writings, he substantially enriched our understanding of the development of both early and recent tort law in this nation.<sup>8</sup> In his current article, *The Beginning and Possible End of The Rise of Modern American Tort Law*,<sup>9</sup> Professor Schwartz provides a history of recent tort law that is a lush mosaic of description and ex-

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standard was greeted with considerable approval by the commentators. "The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1907).

<sup>6</sup> For example, Fleming James, Charles Gregory, and Albert Ehrenzweig. See ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 CALIF. L. REV. 1422 (1966); Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

<sup>7</sup> Notably, in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985), elegantly critiqued in David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529 (1985).

<sup>8</sup> E.g., Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) [hereinafter Schwartz, *Vitality*].

<sup>9</sup> 26 GA. L. REV. 601 (1992).

planation. The literature on American tort law history contains some valuable analyses of certain of its "intellectual" contours,<sup>10</sup> but Professor Schwartz's current article presents the clearest vision to date of the variety of factors that have combined to generate the dramatic developments in tort law since 1960.

There is little of substance with which to quarrel in Professor Schwartz's careful and rich portrayal of recent tort law history. My purpose here, instead, is to add a bit of decoration to his account of tort law history, and to provide it moral depth. The decorative function of my essay is accomplished through the presentation and explanation of two graphic drawings which illustrate the growth and permanence of fault in tort law history. The moral depth is provided by a brief discussion of moral theory which may help explain at once the failure of the Great Strict Liability Experiment and the inevitability of tort law's return to fault as its central ethic.

## I. FAULT IN TORT LAW HISTORY

Fault has always been the driving force within the law of wrongful harms, as discussed above. Yet the role of fault in legal doctrine has varied over time. In accident law, the prominence of fault is largely coincident with the rise of the law of negligence, which has been the principal basis of liability in America during the 1900s. This does not mean of course that negligence law in particular or tort law in general have remained stagnant throughout the century, for much the opposite is true. Indeed, this century has witnessed considerable growth in negligence doctrine and liability, strict liability doctrine, and tort liability in general, as illustrated below in Figure 1.

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<sup>10</sup> See G. EDWARD WHITE, *TORT LAW IN AMERICA* (1980); Priest, *supra* note 7.

FIGURE 1

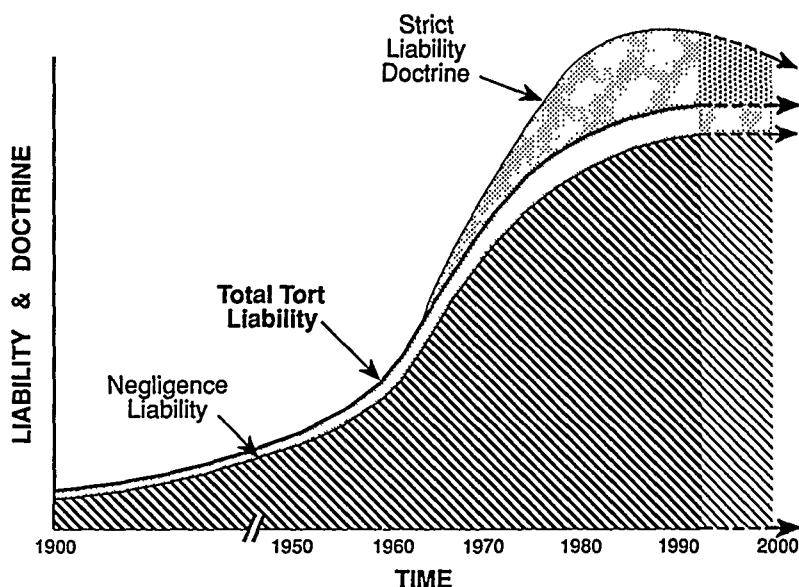


Figure 1 illustrates—conceptually rather than arithmetically—the growth of tort liability and doctrine over time. Developments from 1900 to the present are represented by the solid curves, and by the darker shaded areas below the curves; the broken curves and more lightly shaded areas to the right represent predicted paths of future liability and doctrine. The lower thin curve represents negligence liability, and the upper curve—heavy on the left and thin on the right—represents strict liability doctrine. The heavy, dark curve running directly above (and nearly parallel to) the negligence liability line represents total tort liability,<sup>11</sup> including the sum of both strict and fault-based liability.

Liability based on fault or negligence began the century at a fairly low level. This is not because fault was not then accepted as the principal determinant of liability, but because of the existence at the time of a large number of protective rules of “immunity”<sup>12</sup>

<sup>11</sup> This curve represents total tort liability for *accidents*. Thus, liability for intentional torts is excluded from this figure.

<sup>12</sup> I use the term here in its ordinary, general sense, rather than in its formal, narrow usage as a form of absolute defense traditionally accorded governments, charities, and family members.

shielding defendants from legal responsibility for the consequences of their negligence.<sup>13</sup> For example, negligent manufacturers of defective products were generally protected by the privity rule of *Winterbottom v. Wright*,<sup>14</sup> at least until Benjamin Cardozo overturned the doctrine in New York in 1916.<sup>15</sup> Leaders in society—public officials, business managers, and professionals (and their institutions)—were subjected to liability, if at all, only for the most blatant forms of fault. And contributory negligence barred even slightly careless plaintiffs from recovering against defendants substantially at fault.<sup>16</sup>

The rising slope of negligence liability, portrayed in Figure 1, reflects the breakdown in such immunities as the century progressed, and as fault was freed to perform its appointed tasks. Fault's most dramatic liberation occurred in the 1960s and 1970s, and to some extent thereafter, as courts (and sometimes legislatures) released the tort of negligence from a variety of restrictive rules that immunized many types of actors—manufacturers, landowners, lawyers, doctors, governments, charities, and family members—against legal responsibility for many types of harm—from ordinary personal injury to mental anguish of various types, economic loss, and flagrantly inflicted harm.<sup>17</sup>

The slope of the negligence liability curve begins to level off rather markedly during the 1980s, until it becomes nearly flat by 1990 and beyond. This is not to indicate that negligence liability has stopped expanding in all respects, for new instances of liability—new types of wrongs and new types of wrongdoers—surely will continue to arise as developments in society accelerate in new directions in the future. But Professor Schwartz surely is right in concluding that the period of vast growth for negligence law is

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<sup>13</sup> See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

<sup>14</sup> 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

<sup>15</sup> The case was *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). See generally W. PAGE KEETON, DAVID G. OWEN, JOHN E. MONTGOMERY, & MICHAEL D. GREEN, *PRODUCTS LIABILITY AND SAFETY—CASES AND MATERIALS* 39-52 (2d ed. 1989) [hereinafter *PRODUCTS LIABILITY AND SAFETY*] (examining the *MacPherson* case).

<sup>16</sup> That is, until comparative fault finally began to gain a substantial foothold in this nation in the 1960s. See PROSSER AND KEETON ON TORTS, *supra* note 1, § 67.

<sup>17</sup> That may give rise, in the latter instance, to punitive damages. On the moral dimensions of such damages, see David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989).

over,<sup>18</sup> that we have already witnessed the full flowering of fault, in all its splendor.<sup>19</sup>

In the years ahead, as in the recent past, negligence law should be expected to expand only incrementally. Importantly, parts of it will sometimes actually contract, as various areas of negligence responsibility are found unacceptable because they prove unfair or inefficient in application. Whether the net advance of the negligence curve in future years will remain slightly upward, will become flat, or will trend downward depends upon factors that are very difficult to predict, such as people's attitudes—on personal and corporate responsibility, private insurance and social welfare programs, and the use of courts for allocating accident costs—and upon the nation's economic health.<sup>20</sup>

Strict liability, shown in Figure 1 in the dotted area between the negligence liability curve and the total tort liability curve above, is portrayed as growing almost imperceptively until the 1960s and 1970s, when it begins a modest upward climb. If the graph in Figure 1 contained a separate curve for strict liability, which it does not, it would be represented by a straight line, almost horizontal, toward the very bottom of the figure. From the lower left, it would rise only slightly toward the right, representing the area captured between the lower and middle curves. Thus, strict liability, as such, piggybacks upon the negligence liability curve in Figure 1 to generate the aggregate heavy curve of total tort liability—which represents the sum of negligence liability plus strict liability.

The top curve, representing strict liability *doctrine*, runs coincidentally with the total tort liability curve until the 1960s, when its slope increases sharply; then, in the 1980s, it peaks and begins to

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<sup>18</sup> Schwartz, *supra* note 9.

<sup>19</sup> "[T]he tort liability explosion of the last quarter-century has been very closely tied to changes in the law that have increasingly enabled the negligence principle to expand to its full capacity." Schwartz, *Vitality*, *supra* note 8, at 969.

<sup>20</sup> Together with the not unrelated question of the extent of public and private health care and disability insurance coverage throughout society. Although the availability of affordable health care (and, to a lesser extent, disability) insurance is important to the development of tort law only indirectly, its potential significance is substantial. This is because the willingness of people to consent to a regime that limits responsibility for accidents to negligence depends in part on their belief in an important premise: that a broad first-party accident insurance system, undergirded by a social welfare net, is fairer and cheaper (i.e., consumes fewer personal and social resources) than the third-party insurance mechanism of a strict liability tort-law system.

fall. The curve is described in terms of "doctrine" rather than "liability" to distinguish the rule or *doctrine* of products liability, beginning in the 1960s, that purports to impose "strict" *liability* but does not really. Prior to the 1960s, strict liability and its doctrine tracked together, because the very limited rules of liability for wild animals and ultra-hazardous or abnormally dangerous activities generally were applied by the courts in a meaningful, restrictive fashion. From the early 1960s, for about two decades, the doctrine of strict liability in tort for defective products—not unlike crabgrass—sprouted, spread, and appeared to flourish in the sunshine of an expanding law of torts and consumer rights. But the doctrine's shallow analytical roots proved incapable of providing enduring sustenance, and the doctrine began to wither in the 1980s.<sup>21</sup>

The immediate judicial origins of this decline may be traced to the New Jersey Supreme Court's remarkable repudiation, in the

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<sup>21</sup> Many commentators have examined the substantial failures of the strict products liability doctrine. "Early" articles on the weaknesses of strict products liability theory include Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Richard A. Epstein, *Products Liability: The Gathering Storm*, REG., Sept./Oct. 1977, at 15; Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643 (1978); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976); O.E. Lange, *Compensation of Victims—A Pious and Misleading Platitude*, 54 CALIF. L. REV. 1559 (1966); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) [hereinafter Owen, *Rethinking the Policies*]; Marcus L. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957); William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983); Richard E. Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965).

Helpful, recent treatments of some of the practical and conceptual problems with the doctrine of strict products liability include James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); William C. Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639 [hereinafter Powers, *Modest Proposal*]; and Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819 (1992) [hereinafter A. Schwartz, *Case Against Strict Liability*]. On some of the moral problems with the doctrine, see David G. Owen, *Products Liability: Principles of Justice for the 21st Century*, 11 PACE L. REV. 63 (1990) [hereinafter Owen, *Principles of Justice*]; David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles* (unpublished manuscript, on file with the *Georgia Law Review*) [hereinafter Owen, *Moral Foundations*]. A particularly illuminating essay on problems with the general notion of strict liability is Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CANADIAN J. OF L. & JURIS. 147 (1988).



*Feldman* case in 1984,<sup>22</sup> of its explicit application of conventional strict liability principles to product warnings only two years earlier, in the highly controversial *Beshada* opinion.<sup>23</sup> The California Supreme Court's similarly categorical rejection of strict tort liability in warnings cases, in 1988<sup>24</sup> and 1991,<sup>25</sup> certified the beginning of the end for major chunks of strict liability doctrine in this area. Many courts for many years undoubtedly will continue to apply principles of strict liability to wild animals and extra-dangerous activities, and many no doubt will continue to purport to apply "strict" liability doctrine to products liability in the years ahead, so that the "law" of strict liability should by no means be expected to vanish quickly from the landscape. But the "strictness" in products liability doctrine has been stripped of much of its practical<sup>26</sup> and moral<sup>27</sup> force, and the trend toward its express abandonment should be expected to continue.<sup>28</sup>

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My thesis here is that the dominance of fault in the law of torts is a moral inevitability. Fault lies at the very heart of tort law and provides it with a meaningful, moral definition. The historical truth of this thesis<sup>29</sup> is illustrated in Figure 2, the Fault Pit diagram, below.<sup>30</sup>

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<sup>22</sup> *Feldman v. Lederle Labs.*, 479 A.2d 374, 386 (N.J. 1984) (prescription drug warnings).

<sup>23</sup> *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (asbestos insulation products warnings).

<sup>24</sup> *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988) (prescription drug warnings).

<sup>25</sup> *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991) (all warnings).

<sup>26</sup> See generally Powers, *Modest Proposal*, *supra* note 21, at 640.

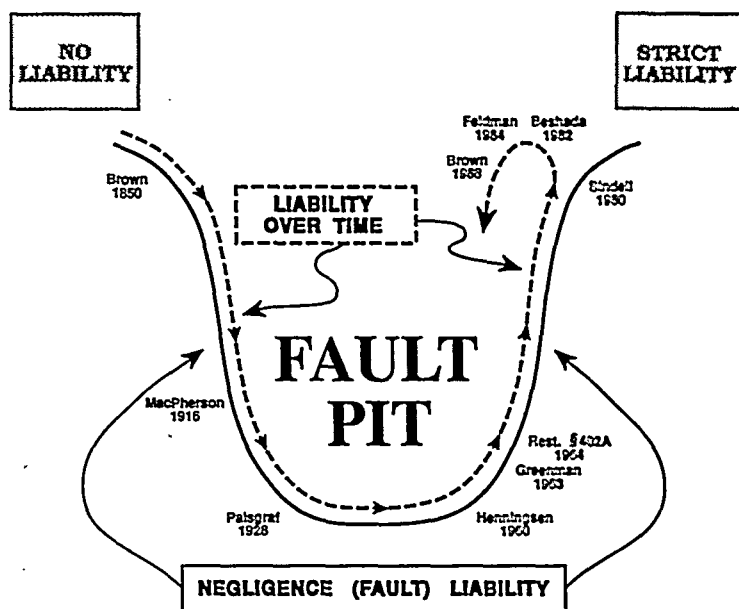
<sup>27</sup> See generally Owen, *Moral Foundations*, *supra* note 21; Owen, *Principles of Justice*, *supra* note 21.

<sup>28</sup> This trend is especially likely to continue in design and warnings cases. See generally Owen, *Moral Foundations*, *supra* note 21.

<sup>29</sup> "Historically, the principle of negligence succeeded in maintaining its centrality in delictual liability, confining strict liability to specific areas." Izhak England, *The Basis of Tort Liability: Moral Responsibility and Social Utility in Tort Law*, 10 TEL AVIV U. STUD. IN L. 89, 97 (1990).

<sup>30</sup> Even more than Figure 1 above, The Fault Pit diagram in Figure 2 is intended only as a metaphorical representation of the points it illustrates.

FIGURE 2



The solid curve in Figure 2 represents the Fault Pit, the domain in law where responsibility for causing harm is defined by fault. It is bordered on the top left side by principles of No Liability, where actors whose blameworthy conduct causes harm to others are for some reason protected from legal responsibility for that harm. On the top right, the Fault Pit is bordered by principles of Strict Liability, sometimes referred to as "absolute" or "no-fault" liability.<sup>31</sup> The dashed line inside the Fault Pit illustrates the progression of liability over time—beginning with the explicit recognition of fault as the proper basis of responsibility in accident law, in *Brown v. Kendall*,<sup>32</sup> to the explicit repudiation of strict liability principles in a major part of products liability law, and the reassertion of the dominant role of fault, in *Brown v. Superior Court*.<sup>33</sup>

It is, of course, sheer coincidence that the explicit birth and re-

<sup>31</sup> Gary Schwartz and others have distinguished "strict" from "absolute" liability, a distinction that is unnecessary for the rough No Liability—Fault—Strict Liability tripartite model employed here.

<sup>32</sup> 60 Mass. (6 Cush.) 292 (1850).

<sup>33</sup> 751 P.2d 470 (Cal. 1988).

birth of fault in the law of torts in America, an entire continent and nearly a century and a half apart, occurred in both instances in a case called *Brown*. The path between the two was long and tortuous, and few would have had the foresight as late as 1978 to predict that the California Supreme Court would certify a substantial repudiation of the strict liability doctrine in products liability law a mere ten years later. The sharp change in direction of liability between 1978 and 1988 in the Fault Pit diagram illustrates the virtual reversal of doctrine within this short span of years. Professor Schwartz well describes and explains many aspects of this development in his article, and so I shall here only point out several highlights of the law along the road into, through, and ultimately back into the Great Pit of Fault.

As stated earlier, the journey begins in 1850 with *Brown v. Kendall*, in which Chief Justice Shaw held that a man could not be liable without fault for striking and injuring another accidentally while brandishing a stick in an attempt to separate fighting dogs. Since proof of a defendant's fault had not been considered a necessary element of the plaintiff's case before in Massachusetts, the *Brown* decision propelled fault to center stage in accident litigation. Fault had not been irrelevant to liability prior to 1850, but its doctrinal role generally was a secondary one, often shunted to the rear in defensive pleas and camouflaged in arcane rules of pleading. The older law thus should not be characterized as "no-fault" or as "strict," for fault in some form lay within it.<sup>34</sup> Instead, because of the many rules that prevented victims of accidental harm from recovering against those who caused the harm, the regime before 1850 may be better characterized by the notion of No Liability,<sup>35</sup> as discussed above. After 1850, other states followed *Brown* in adopting fault or negligence as the rule of liability,<sup>36</sup> and by the time Holmes published *The Common Law* in 1881, negligence had become the controlling principle of the law of accidents.<sup>37</sup>

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<sup>34</sup> See generally *supra* text accompanying note 3 and sources cited therein.

<sup>35</sup> See Rabin, *supra* note 13, at 935-45.

<sup>36</sup> It should be noted that a couple of states preceded Massachusetts in holding fault necessary to tort liability. See, e.g., *Harvey v. Dunlop*, 1 Hill & Den. 193, 194 (N.Y. 1843); *Lehigh Bridge Co. v. Lehigh Coal & Navigation Co.*, 4 Raule 8, 25-26 (Pa. 1833).

<sup>37</sup> See HOLMES, *supra* note 3, at 88-90.

In 1916, in *MacPherson v. Buick Motor Co.*,<sup>38</sup> Benjamin Cardozo extended the reach of fault liability to manufacturers of defective products; in 1928, in *Palsgraf v. Long Island Railroad*,<sup>39</sup> shortly before he replaced Holmes on the Supreme Court, Cardozo framed the outer boundary of liability in terms of a person's capacity to control risk, confining responsibility to "the orbit of the danger as disclosed to the eye of reasonable vigilance."<sup>40</sup> In this manner, *Palsgraf* provided further power to the role of fault in the law of accidents by protecting actors from accountability in the law for harms they could not foresee and, hence, in no way willed.<sup>41</sup> *Palsgraf* thus may be seen as heralding the Golden Age of Fault, which lasted for one-third of a century until the spell was broken by an opinion from across the Hudson River in New Jersey.

The decision, authored by Justice Francis, was *Henningsen v. Bloomfield Motors, Inc.*,<sup>42</sup> and the year was 1960.<sup>43</sup> The case was not a torts case, strictly speaking, but one of warranty, involving injuries from a defective car. But the New Jersey court treated the case as if it had been labelled "tort," by stripping away the Chrysler Motor Company's defenses based on contract—including its reliance on a disclaimer and limitation, and on its absence of privity with the victim. In allowing "strict liability" for breach of "warranty," but denying the classic contract defenses, *Henningsen* effectively adopted a principle of strict liability in "tort." So reasoned Justice Traynor for the California Supreme Court three years later, in *Greenman v. Yuba Power Products, Inc.*,<sup>44</sup> and so

<sup>38</sup> 111 N.E. 1050 (N.Y. 1916).

<sup>39</sup> 162 N.E. 99 (N.Y. 1928).

<sup>40</sup> *Id.* at 100. "The risk reasonably to be perceived defines the duty to be obeyed . . . ."

*Id.*

<sup>41</sup> See the explanation of this point by the Privy Council, in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound I)*, [1961] App. Cas. 388, 422-23, [1961] 1 All E.R. 404, 413 (P.C.):

[I]t does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability . . . that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule . . . .

<sup>42</sup> 161 A.2d 69 (N.J. 1960).

<sup>43</sup> The same year that produced the liberal presidency of John F. Kennedy.

<sup>44</sup> 377 P.2d 897 (Cal. 1963).

pronounced the American Law Institute, in section 402A of the *Restatement (Second) of Torts*, the following year.<sup>45</sup>

The explosive spread of the principles of strict products liability across the nation in the 1960s and the 1970s is chronicled in many places<sup>46</sup> and need not be retold here. Despite some rumblings of discontent from the first "crises" of products liability law and insurance in the late 1970s,<sup>47</sup> the permanence of strict products liability in tort seemed assured by 1980.<sup>48</sup> This was the year Justice Mosk of California spread the tentacles of no-fault products liability for a single plaintiff's harm across an entire industry, where a plaintiff was unable to identify the manufacturer of a suspect prescription drug. The case was *Sindell v. Abbott Laboratories*,<sup>49</sup> and the novel doctrine of causal attribution was "market share" liability. The new doctrine seemed logical and fair, at least to some extent and in the abstract. Yet it threw not only fault but causation to the winds, and the conversion of the doctrine's theory to the realities of litigation promised to be rife with difficulty.<sup>50</sup>

The reach of strict products liability was expanding ever wider, and so few were much surprised two years later when the New Jersey court announced, in the asbestos case of *Beshada v. Johns-Manville Products Corp.*,<sup>51</sup> that its "strict liability" rule was truly strict. The court there held that a product sold without warning of a hidden danger was defective, subjecting its manufacturer to liability for resulting harm, regardless of the unforeseeability of the

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<sup>45</sup> The ALI adopted § 402A in 1964, and the section was officially promulgated with the *Restatement's* publication in 1965.

<sup>46</sup> The classic early narrations are by Dean Prosser. See William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). For a more recent depiction, see, e.g., PRODUCTS LIABILITY AND SAFETY, *supra* note 15, at 158-88.

<sup>47</sup> See generally PRODUCTS LIABILITY AND SAFETY, *supra* note 15, at 1012.

<sup>48</sup> Even if still critiqued. See, e.g., Owen, *Rethinking the Policies*, *supra* note 21.

<sup>49</sup> 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

<sup>50</sup> As well predicted by Professor Fischer. See David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); see also Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377, 1378-82 (1985); Keith C. Miller & John D. Hancock, *Perspectives on Market Share Liability: Time for a Reassessment?*, 88 W. VA. L. REV. 81 (1985); Victor E. Schwartz & Liberty Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CAL. L. REV. 941 (1985).

<sup>51</sup> 447 A.2d 539 (N.J. 1982).

risk.<sup>52</sup> The manufacturer, in other words, was proclaimed to have a duty to warn of every danger, whether knowable or not, or pay the consequences.

*Beshada* was the first products liability decision rendered by a major court in which the outcome of the case explicitly depended upon the principle of strict liability, where the manufacturer's total inability to foresee or guard against the danger was both alleged and held to make no difference. The high-water mark of modern strict liability law had been reached, and the commentators railed against this nonsense.<sup>53</sup> The New Jersey Court appears to have listened to the critical commentary and, remarkably, it entirely changed its mind—a mere two years later, in *Feldman v. Lederle Laboratories*,<sup>54</sup> a case involving a prescription drug, in which it all but overruled *Beshada*.

*Feldman* marked the end of the rise of strict liability in warnings cases, if not the beginning of its decline, as illustrated in the Fault Pit diagram. *Feldman* defines the point at which the law turns away from its lock-step march toward strict liability, back toward principles of fault. Lest *Feldman* have been interpreted as a fluke, the California Court certified its rectitude in another prescription drug case in 1988, *Brown v. Superior Court*,<sup>55</sup> and then announced a broad rejection of strict liability in the product warning context three years later.<sup>56</sup>

The significance for the law of torts of *Feldman* and *Brown*, in combination, cannot be overstated. Together they represent the rejection of the doctrine of strict liability in an important area of tort law by the very two courts that had led the nation in the expansion of tort liability during the 1960s and 1970s. It is principally for this reason<sup>57</sup> that the Fault Pit diagram shows the liability over time

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<sup>52</sup> The risk was to workers of contracting asbestosis, mesothelioma, and other illnesses from asbestos insulation products.

<sup>53</sup> Or "rubbish," in English. Much of the most immediate railing occurred in a symposium published by the *New York University Law Review* in 1983. See Symposium, *The Passage of Time: The Implications for Product Liability*, 58 N.Y.U. L. REV. 734 (1983). The *Feldman* decision itself cites several articles critical of *Beshada*. *Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984).

<sup>54</sup> 479 A.2d 374 (N.J. 1984).

<sup>55</sup> 751 P.2d 470 (Cal. 1988).

<sup>56</sup> *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991) (asbestos).

<sup>57</sup> Also during the 1980s, the decline of the strict products liability doctrine is similarly observable, usually indirectly and less dramatically, in other judicial opinions and, often

curve arching up and bending completely back, from 1982 to 1988, into the direction of the Great Pit of Fault—where strict liability has no place, and where moral and legal fault rule supreme.

## II. A MORAL EXPLANATION FOR FAULT IN TORT LAW

In describing the dominant role of fault in tort law history, I have so far postulated its propriety in moral theory. It remains in this section for me to explain, partially and very briefly, how moral philosophy supports, indeed demands, the primacy of fault in a system of legal responsibility for accidental loss. Establishing this general point will demonstrate two interrelated, subsidiary propositions: (1) that persons *should* be legally responsible for their faulty conduct that causes harm, to others or themselves; and (2) that persons *should not* be legally responsible for causing harm in the absence of personal moral fault.

Why *should* the law of torts be based on moral fault? Conversely, why should not the law instead place responsibility upon persons "strictly" for merely causing harm? And why should not the law have a rule of no liability for any accidental harm, leaving all such losses where they fall? For answers to these questions one may begin by examining why the law should care about accidental harm at all, and what it may want to do about such harm. We may look initially, in other words, at what the purposes of accident law should be.<sup>58</sup>

Accidents harm victims and society. By definition, an accident diminishes the quality (and perhaps quantity) of a victim's life and other goods, which produces suffering for the victim. We may assume that human suffering is undesirable and so should be avoided, *ex ante*, or remedied, *ex post*.<sup>59</sup> Moreover, because accidents consume human and other social resources, society suffers

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more directly, in various "tort-reform" statutes.

<sup>58</sup> For discussions of the goals of tort law, see PRODUCTS LIABILITY AND SAFETY, *supra* note 15, ch.1; Thomas A. Cowan, *The Victim of the Law of Torts: A Morality Play in Prologue and Dialogue*, 33 ILL. L. REV. 532 (1939); Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942); Glanville Williams, *The Aims of the Law of Tort*, 4 CURRENT LEG. PROB. 137 (1951). For critiques of the conventional goals of tort law, see, e.g., Owen, *Rethinking the Policies*, *supra* note 21; A Schwartz, *Case Against Strict Liability*, *supra* note 21; Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985).

<sup>59</sup> Unless the cost of such avoidance or remedy is, by some fair measure, excessive.

harm to its aggregate stock of goods by accidents.<sup>60</sup> Finally, if accidental harm results from the actor's improper treatment of the victim, society's norms of proper interpersonal behavior are harmed as well. There are thus good reasons why society should care about accidental harm.

What, then, may the law choose to *do* about the problem of accidental harm? If the law requires injurers to pay victims for their losses, it may at once help relieve the suffering of victims, admonish injurers, and discourage potential injurers from acting in a similarly dangerous manner in the future. In conventional parlance, the law in this way may serve two functions: (1) compensating injury victims, and (2) punishing injurers. Punishing injurers tends to achieve two subsidiary goals: (a) providing vindication to victims, and (b) deterring injurious conduct. These would appear to be desirable goals which would seem to imply that the law should adopt a rule of strict liability—a rule requiring injurers generally to pay for accidental harm they cause.

Yet there is a fundamental problem here that involves the limits to this principle: the law should not create more harm than cure. If the goal of compensation is to relieve the victim's harm, compensation is plainly inappropriate when it causes even greater harm to other persons—especially if there is some other, better way to alleviate the victim's economic burden.<sup>61</sup> If the goal of punishment is to vindicate and discourage improper harms, punishment is plainly inappropriate when the harm at issue was instead quite proper, if it was necessary to the creation of some greater good. Railroads, automobiles, and pesticides by their nature sometimes cause ancillary harm to persons, but many such dangerous things are necessary to modern life. Dangerous products of this type may be made or used improperly, causing improper accidental harm. But it is in the nature of such dangerous things, unfortunately but inevitably, that sometimes they will also cause "proper" accidental harm, despite their having been made and used with all due care. The law of torts should not punish the proper manufacture or use of such items, and the compensation needs of accident victims resulting from their proper manufacture and use are better handled by in-

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<sup>60</sup> Unless the conduct that caused the accident generated more goods than it consumed.

<sup>61</sup> As by private insurance or public welfare mechanisms. See David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665 (1985); Sugarman, *supra* note 58.



surance mechanisms.<sup>62</sup>

As a rule of general operation, strict liability thus is bad because it is far too blunt an instrument that operates far too broadly—not only does it sometimes properly rectify and prevent wrongful harm, but it also sometimes itself *creates* improper harm. Strict liability thus suffers from being conceptually simplistic, inherently unable to distinguish proper from wrongful harms, good conduct from bad. It thus has no intrinsic moral value<sup>63</sup> since it serves only to shift monetary resources from injurers to victims. Such resource shifting may as likely cause more suffering than it cures, and may as likely waste more social resources than it saves. When the law so operates without good reason, it is at best unnecessary and excessive, and may well be an evil in itself.<sup>64</sup>

Strict liability therefore has no normative power as a legal instrument to help society with the central problems of distinguishing between accidents that are acceptable from those that are not, or of determining how to handle accidents of the unacceptable variety. This is where moral philosophy, and notions of wrongfulness, moral fault, and desert, can help. While causation and damage of course are necessary to responsibility for harm, the central issue is not whether an actor *caused harm*, but whether he caused *wrongful harm*.<sup>65</sup> By definition, a person is morally to blame, “at fault,”

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<sup>62</sup> Through private, first-party health and disability insurance, and by public welfare programs. See Owen, *supra* note 61.

<sup>63</sup> Despite its intrinsic moral failure as a rule of general applicability, strict liability serves a useful role in certain narrow contexts where the excessive nature of the risk to victim rights is clear. Among the few paradigms of this type are harms from wild animals and harms from manufacturing flaws in products. On the latter point, see Owen, *Moral Foundations*, *supra* note 21.

<sup>64</sup> HOLMES, *supra* note 3, at 96. “Law would be reduced to tyranny, and its purposes deprived of a vital dimension, if it were viewed one dimensionally as a good. . . . [L]ike most everything known to man, [it] is an evil in excess.” David G. Owen, *Respect for Law and Man: The Tort Law of Chief Justice Frank Rowe Kenison*, 11 VT. L. REV. 389, 407 (1986).

<sup>65</sup> This essential point is elemental to the notion of corrective justice. See generally Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. (forthcoming 1992); Richard Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. (forthcoming 1992). And the point is fundamental in the law of torts:

At common law, tort liability has primarily been grounded not on the notion that the defendant by his *mere* act or omission has caused harm to the plaintiff, but rather on the notion that the defendant by his *wrongful* act or omission has caused harm to the plaintiff. The root idea of tort law is that the defendant must be “in the wrong,” “at fault,” “unjustified,” “blameworthy,” or “culpable” for liability to attach to his conduct.

for causing *wrongful* harm. Conversely, a person is free from blame, "faultless," for causing only *proper* harm.<sup>66</sup> How, then, may the law determine whether harm has been caused "wrongfully"—or, instead, "properly"—by an actor?

The answer to this question requires an inquiry into the moral character of human action, which begins with the concept of freedom. Freedom, or "autonomy," is "the supreme principle of morality."<sup>67</sup> Based upon the premise of free will, the freedom ideal entails the notion that human dignity and morality derive from the ability of each person rationally to make choices among alternatives in the pursuit of goals selected by the individual.<sup>68</sup> Because persons are by nature free, their choices may be good or bad, which generates the notion of moral responsibility—moral accountability for the propriety of such choices. Thus, from freedom and responsibility springs the notion of desert, both positive and negative: persons deserve praise (credit) for making choices that are good, and blame (discredit) for making choices that are bad. This means that human behavior (and resulting consequences), and a person's choices that underlie behavior, may be judged against a moral standard.

If tort law is to have a moral center, as I believe it does and must, then it should first and foremost reflect, protect, and promote human freedom, to the extent that it is able to do so without undue cost. When both the causes and effects of a person's choices are largely internal to that person, as a decision to eat a sandwich rather than read a book, there ordinarily is no occasion for the law to concern itself with the moral quality of the choice. Yet when a person's choices involve harm to others, interfering with the ability of those other persons to exercise their own wills free from outside interference, the law has an important role to play in defining and enforcing the boundaries between personal freedom of action and

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Snow v. City of Columbia, 409 S.E.2d 797, 799 (S.C. Ct. App. 1992) (Bell, J.).

<sup>66</sup> But see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L.Q. REV. 530 (1988).

<sup>67</sup> IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* \*440 (L. Beck trans., 1959) (1785).

<sup>68</sup> "Autonomy is thus the basis of the dignity of both human nature and every rational nature." *Id.* at \*436; see also *id.* at \*452-53. "The will is free, so that freedom is both the substance of right and its goal . . ." GEORG HEGEL, *PHILOSOPHY OF RIGHT* para. 4 (T. Knox trans., 1952) (1821).

personal security from harm. So tort law properly may hold a doctor responsible for a detrimental result, flowing from a calculated risk inherent in a particular surgical procedure, if the doctor fails to obtain the patient's informed consent before the operation.<sup>69</sup> So, too, tort law may properly hold a person accountable for choosing to act in a manner that is likely to bring injury upon himself, as by running into a busy street.<sup>70</sup> Yet, fundamental as the freedom ideal surely is, in many cases it is an insufficient guide in itself for determining moral accountability for accidental harm.

Probably the most enduring ethic for helping freedom sort out the moral implications of collisions between autonomous persons, each of whom at the time was pursuing his own objectives, is the ideal of equality. The central importance of equality within a system of law and ethics is traceable to Aristotle, for whom equality provided the substantive core of the concept of "corrective justice."<sup>71</sup> Equality was also central to the justice system of Immanuel Kant,<sup>72</sup> the father of modern liberal philosophy. And it is a central value within the justice constructs of a number of leading modern legal philosophers, notably Rawls<sup>73</sup> and Dworkin.<sup>74</sup>

Equality as a social ideal may be defined in many ways, but within a free society may perhaps best be defined "weakly" as requiring an "equality of concern and respect" for the interests of other persons.<sup>75</sup> By this standard, the moral character of a person's

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<sup>69</sup> See PROSSER AND KEETON ON TORTS, *supra* note 1, at 189-92.

<sup>70</sup> See generally *id.* § 68 (assumption of risk).

<sup>71</sup> [T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavor of the judge is to equalize it . . .

ARISTOTLE, THE NICOMACHEAN ETHICS 154 (J. Welldon trans., 1987); see generally sources cited *supra* note 65.

<sup>72</sup> See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (RECHTSLEHRE) \*231-38 (J. Ladd trans., 1965) (1797).

<sup>73</sup> Rawls's first principle of justice provides: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).

<sup>74</sup> RONALD M. DWORKIN, LAW'S EMPIRE 295-301 (1986); see ERIC RAKOWSKI, EQUAL JUSTICE (1991). John Finnis considers equality one of three elements embraced in the concept of justice. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 161-64 (1980).

<sup>75</sup> See RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 182 (1977) (noting that Rawls's "justice as fairness rests on an assumption of a natural right of all men and women to an equality of concern and respect [possessed] simply as human beings with the capacity to make plans and give justice").

choice to act in a manner causing harm to another person is dependent upon whether the actor accorded equal concern and respect to the other's interests at the time of choice and action. Such respect requires, first, that actors properly regard the vested "property" (and other established) rights of other persons, just as actors would want others to respect their own possession of such rights. Both the law of crimes and torts thus protects persons against the theft of a book and against an unprovoked punch in the nose. By according protection to such established rights, the law provides each person with a fundamental groundwork of security in one's person and property. This security permits persons to go about the business of life, pursuing their various personal goals, without having to invest substantially—financially or emotionally—in constant and vigilant self-protection against such thefts of their established rights.

Accidents, however, ordinarily cannot be viewed usefully as "takings" of such established "rights," demanding compensation.<sup>76</sup> The general application of this form of "taking" perspective to every accident case would amount to a rule of strict liability, which is unacceptable as explained above. Instead, when an actor's choice of action involves only a *risk* of harm to others, necessary and incidental to the pursuit of some proper goal not harmful in itself, then the moral character of the action depends on an evaluation of the *relative worth* of the affected *interests*<sup>77</sup>—principally of the actor and the victim but also of other persons. If an act is likely to achieve a good for the actor and others that is greater than any harm foreseeably risked to the victim and others, then it is morally justifiable in terms of equality, and vice versa.<sup>78</sup> Not only is this form of risk-benefit analysis for evaluating risky conduct supported by the ideal of equality, and hence by freedom, but it is also supported by utility. That is, this approach to responsibility for harm measures the moral quality of an act by the extent to which the act is calculated to advance the aggregate (net) welfare of ev-

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<sup>76</sup> Why the "taking" paradigm, useful in the intentional tort context, is unhelpful in analyzing accident cases is a difficult problem that lies at the heart of the moral foundations of tort law. See Owen, *Moral Foundations*, *supra* note 21, at 19-36, 52-55.

<sup>77</sup> And on the likelihood that, and the degree to which, such interests may be affected by the action.

<sup>78</sup> Assuming that the victim has no special right against such risks, arising for example from the actor's prior promise to protect the victim against such risks.

everyone in society.<sup>79</sup>

Learned Hand embraced this kind of calculus-of-risk approach for judging the quality of choices in the celebrated  $B < P \times L$  formula for negligence described in *United States v. Carroll Towing Co.*<sup>80</sup> The Hand formula is often perceived as providing an economic model of negligence law,<sup>81</sup> and to a large extent it does. More important to moral theory, however, is that interest balancing of this sort requires actors to accord the interests of other persons equal consideration to their own,<sup>82</sup> and that conduct that seeks to maximize society's scarce resources, and to minimize waste, generally advances social welfare.

Equality and utility, therefore, support a definition of fault in terms of a calculus of risks and benefits. Because this method for determining moral and legal responsibility for accidental harm can accommodate the particular interests of all concerned—actors, victims, and other affected persons—it is rich enough to integrate the variety of considerations ordinarily involved in such determinations. As helpful as it is, however, if aggregate interest balancing of this type were used as the *primary* definition of liability for accidental harm, it could be faulted for denying value to important individual rights of the parties to an accident. For this reason, risk-benefit analysis generally should be resorted to only as a “default rule,”<sup>83</sup> for use when a freedom and vested rights analysis fails to provide an adequate resolution of a dispute. Even in such a default role, however, risk-utility principles are powerful tools for determining responsibility. Principles of freedom and vested rights alone frequently are unable to resolve the complex questions of accountability in such cases, as discussed above, and risk-benefit

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<sup>79</sup> For accounts of utilitarianism in its classical form, see JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789); JOHN STUART MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* (1863). For a helpful comparison of utility and equality in the context of accident law, see DWORKIN, *supra* note 75, at 288-301.

<sup>80</sup> 159 F.2d 169, 173 (2d Cir. 1947) (expressing the concept, in algebraic terms, as negligence being implied if  $B < PL$ , where B is the burden or cost of avoiding accidental loss, P is the increase in probability of loss if B is not undertaken, and L is the probable magnitude or cost of such loss). Hand first employed this approach in *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

<sup>81</sup> Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

<sup>82</sup> By acting in a manner that respects the interests of others, or by paying for harm caused by denying the equality of others.

<sup>83</sup> See Owen, *Moral Foundations*, *supra* note 21.

analysis often provides the most helpful guide for determining moral and legal responsibility for accidental harm.

In the final analysis, however, whether the law of torts turns to freedom, vested rights, equality, or utility as the primary determinant of responsibility for harm, it rests at bottom on principles of moral fault.

### CONCLUSION

Fault defines the center of the law of wrongful harms. This important fact is demonstrated by the dominant role of fault in the history of tort law in this nation, particularly by tort law's dramatic return of fault in the last decade. The Great Strict Liability Experiment in products liability has mostly proved a failure, and its continuing decline, although sometimes wavering, appears inevitable.

The failure of a broad principle of strict liability, and the restoration of fault to its natural position at the heart of the law of torts, was morally inevitable. The ideals of freedom and equality require that the interests of actors and other persons be accorded an equal dignity to those of accident victims. This implies, first, that actors must respect the established rights of other persons. Yet when the interests of other persons do not have such prior value,<sup>84</sup> then actors are morally to blame, and should be legally accountable, only for causing "improper" accidental harm, that is, foreseeable harm that reasonably appeared "excessive" when compared to the reasonably expectable benefits to the actor and other persons.

When persons suffer accidental harm incident to proper conduct, conduct that reflects due respect for the prior rights of potential victims and that appears on balance likely to cause more good than harm, the law of torts has no proper role to play.<sup>85</sup> Persons may protect themselves by insuring against the economic consequences of such "unavoidable" risks of harm—whether unforeseeable or necessary for the greater social good—and government may otherwise protect those who are unable to insure themselves. But tort law concerns the law of "wrongs," not insurance, and thus should generally seek to rectify harm resulting only from individual moral

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<sup>84</sup> Or when they are trivial or incommensurable.

<sup>85</sup> Except to declare the propriety of such conduct.

fault.

Lying at the center of the law of torts is the Great Pit of Fault, a kind of legal inferno, into which moral miscreants are thrown kicking and screaming to their certain doom. Yet the Fault Pit contains much more than darkness and despair, for it is lined not with recrimination but with moral rectitude. Finding its source deep within philosophical values, moral and political, the Fault Pit generates a wellspring of ethical bounty, providing a touchstone of propriety—based upon human freedom, individual responsibility, equality of respect, and social utility—to guide all persons in their actions affecting others.